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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CONSUMERS CENTRAL HEATING
COMPANY,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 80-95

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal of civil penalties totaling \$1250 for alleged violations relating to asbestos, having come on regularly for formal hearing on July 8, 1980, while convened at Lacey, Washington, and on September 3, 1980, while convened at Seattle, Washington. The appellant was represented on the first day of hearing by its attorney, Charlotte N. Chalker; appellant failed to appear on the second day of hearing and respondent appearing through its attorney, Keith D. McGoffin, with William A. Harrison presiding, and the Board having considered the exhibits, records and files

1 herein, and having reviewed the Proposed Order of the presiding
2 officer mailed to the parties on the 21st day of October, 1980,
3 and more than twenty days having elapsed from said service; and

4 The Board having received no exceptions to said Proposed Order
5 and the Board being fully advised in the premises; NOW THEREFORE,

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed
7 Order containing Findings of Fact, Conclusions of Law and Order dated
8 the 21st day of October, 1980, and incorporated by reference herein
9 and attached hereto as Exhibit A, are adopted and hereby entered as
10 the Board's Final Findings of Fact, Conclusions of Law and Order
11 herein.

12 DATED this 3RD day of December, 1980.

13 POLLUTION CONTROL HEARINGS BOARD

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16 NAT W. WASHINGTON, Chairman

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18 DAVID AKANA, Member

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25 FINAL FINDINGS OF FACT,
26 CONCLUSIONS OF LAW & ORDER

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IN THE MATTER OF
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COMPANY,

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PROPOSED FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of civil penalties totaling \$1250 for alleged violations relating to asbestos, came on for hearing before the Pollution Control Hearings Board on July 8, 1980, while convened at Lacey, Washington, and on September 3, 1980, while convened at Seattle, Washington. Nat W. Washington, Chairman, attended the first day of hearing. Hearing examiner William A. Harrison presided on both days of hearing. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared on the first day of hearing by its attorney,

EXHIBIT A

Charlotte N. Chalker. Appellant failed to appear on the second day of hearing. Respondent appeared on both days of hearing by its attorney, Keith D. McGoffin. Reporters Betty Koharski and Ruth I. Johnson recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard or read and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Respondent, pursuant to RCW 43.21B.260 has filed with this Board a certified copy of its Regulation I containing respondent's regulations and amendments thereto of which official notice is taken.

II

Appellant, Consumers Central Heating Company (CCH) was established in 1919 to supply steam to downtown Tacoma buildings for the purpose of heat and hot water. This was accomplished by burning "hog fuel" (woodwaste) in brick boilers inside a wooden building on the CCH premises on Dock Street about two blocks from downtown Tacoma. The piping used to channel steam from the boilers was heavily insulated with asbestos.

In 1966, regular use of the brick boilers was discontinued. A new oil and gas burning metal boiler with anti-pollution attachments was then purchased by CCH. This was placed outside the CCH wooden building and enclosed within a new metal building having one open side that was bolted to the wooden building. A large part of the wooden

building's wall was removed to allow free movement between the wooden building and its new, metal "room". The new oil and gas boiler was connected to the piping inside the old wooden building by only one pipe, 12 inches in diameter, and asbestos insulated.

III

On August 31, 1979, CCH ceased its steam production and was in the process of terminating business. The CCH stock was apparently in a testamentary trust with a bank as trustee and CCH officer. The only other CCH officer and sole CCH employee, Mrs. Francis Lynam, kept part-time hours at an office away from the boiler premises. Security guards were posted until, at the latest, December 31, 1979, at which time the boiler premises were entirely unattended. Mrs. Lynam has not visited the boiler premises since autumn, 1979.

IV

In November or December, 1979, CCH sold the new oil and gas boiler and metal building to U.S. Oil Company. U.S. Oil Company severed these by one cut of the 12 inch connecting pipe and unbolting of the new metal building from the old wooden one. This it completed on March 17, 1980. There was no substantial exposure of friable asbestos caused by that activity. Prior to March 17, 1980, unknown persons dismantled both the piping and the brick structure of the old boilers within the wooden building. These persons salvaged the piping valves and firebricks as these were dismantled.

On March 25, 1980, acting upon information from the State Department of Labor and Industries, respondent's inspector visited the

boiler premises. Through the opening left by removal of the metal building he saw abundant amounts of white dust covering firebrick and other debris strewn about the floor inside the old wooden building. No one was present within the wooden building. A contractor, Bodecker Company, Inc., was at work dismantling the brick chimney above the roofline. The inspector determined that Bodecker was not working inside, but had access thereto for storage. He asked the foreman if he might go inside. The foreman did not object. Samples taken inside proved that the white dust on the floor consisted partially of friable asbestos. The dust was as much as one foot deep in some places. The inspector also found asbestos dust outdoors some 50 feet from the wooden building. The outdoor dust originated from asbestos covered pipe stored by the City of Tacoma at that location for several years prior to their removal, shortly before the inspector's visit. The inspector did not see any airborne asbestos dust nor did he see any demolition operationn causing it to become exposed.

On March 26, 1980, the next day, the inspector observed the same scene as just described. On March 27, 1980, the inspector discussed his observations with Mrs. Lynam although the scene remained the same on that day and on March 31, and April 1, 1980, of the week following. Ultimately a contractor was ergaged by CCH, R. W. Rhine, Inc., who, subsequent to the facts of this case, removed the entire wooden building, its contents and the asbestos dust.

Appellant, CCH, later received from respondent five Notices of Civil Penalty each relating to one of the five days set forth above

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 and each assessing a \$250 civil penalty for a total of \$1250.
2 Violations were alleged of 1) WAC 173-400-045 and the federal rules
3 adopted thereby and which relate to asbestos, namely: 40 CFR,
4 Sections 61.22(d)(2), 61.22(j)(3)(1)(B), and 61.22(d)(4)(1) which are
5 set forth further in our Conclusions of Law, 2) respondent's Section
6 9.11(a) of Regulation I. From these penalties, appellant appeals.

7 V

8 Any Conclusion of Law which should be deemed a Finding of Fact is
9 hereby adopted as such.

10 From these Findings the Board comes to the following

11 CONCLUSIONS OF LAW

12 I

13 Subsequent to the July 8, 1980, hearing in this matter, counsel
14 for appellant directed a letter to this Board and other officials of
15 state government stating:

16 "The evidence taken and presented by the agency
17 at the July 8th hearing is inadmissible under the
Supreme Court cases [citing authority]."

18 During the July 8, 1980, hearing, however, this Board extended the
19 opportunity to appellant to object to agency evidence taken on the CCH
20 premises and to file a legal memorandum in support thereof to which
21 the respondent agency could reply. Appellant expressly declined to
22 make such objection (TR p. 23, line 22 to p. 25, line 8; p. 30, line
23 17; p. 31, line 14; p. 40, line 25; p. 42, line 16; p. 72, line 7).
24 There being no objection raised during hearing we will consider all of
25 the evidence then offered and admitted. In the Conclusions of Law
26 which follow we consider each of the violations alleged by respondent.

II

The respondent seeks to enforce a regulation of the State Department of Ecology, WAC 173-400-075 which adopts and incorporates by reference the federal emission standards for asbestos as promulgated prior to November 1, 1976.

Firstly, respondent cites 40CFR61.22(d)(2) which provides:

Written notice of intention to demolish or renovate shall be provided to the Administrator by the owner or operator of the demolition or renovation operation. Such notice shall be postmarked or delivered to the Administrator at least 10 days prior to commencement of demolition . . ." (emphasis added)

In this case, the only demolition leading to the asbestos dust in question was that conducted inside the wooden building, before the inspectors arrival, by persons unknown. The respondent has not proven that those persons were CCH employees nor that CCH authorized that demolition. In fact, the only evidence is that the persons causing such demolition are unknown. There is therefore no basis to conclude that CCH intended such demolition so as to place the duty of complying with the notice requirement upon CCH. The civil penalty for the alleged violation of 40CFR61.22(d)(2) should be vacated.

III

Next, respondent cites 40CFR61.22(j)(3)(i)(B) which provides:

"After wetting, all asbestos containing waste material shall be sealed into leak tight containers while wet, and such containers shall be deposited at waste disposal sites . . ."

This is not a mandatory rule. Under 40CFR61.22(j)(1) which preceeds the above quoted rule:

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 "There shall be no visible emissions to the
2 outside air, except as provided in paragraph (j)(3)
3 of this section, during the collection; processing,
4 including incineration; packaging; transporting; or
5 desposition of any asbestos-containing waste material
6 which is generated by such source." (emphasis added)

7 The initial wording of paragraph (j)(3) is:

8 "Rather than meet the requirement of paragraph
9 (j)(1) of this section, an owner or operator may
10 elect to use either of the disposal methods specified
11 under (j)(3)(1) and (11) . . ."

12 Thus, one who conducts demolition of an asbestos-containing structure
13 may chose not to use the method of paragraph (j)(3)(1)(B), cited by
14 the respondent, so long as there are no visible emissions to the
15 outside air. The respondent has not proved such emissions in this
16 case. The civil penalties for the alleged violations of
17 40CFR61.22(j)(3)(1)(B) should be vacated.

18 IV

19 Next, respondent cites 40CFR61.22(d)(4)(i) which provides:

20 "Removal of friable asbestos materials used on
21 any pipe, duct, or structural member which are
22 encased in concrete or other similar structural
23 material is not required prior to demolition, but
24 such materials shall be adequately wetted whenever
25 exposed during demolition."

26 The persons to whom the above rule applies is set forth at
27 40CFR61.22(d) which introduces the above rule:

28 "Demolition and renovation. The requirements of
29 this paragraph shall apply to any owner or operator
30 of a demolition or renovation operation who intends
31 to demolish any . . . commercial, or industrial
32 building . . ." (emphasis added)

33 The respondent has not proven that the persons who conducted the

demolition resulting in the asbestos dust in question were CCH employees or persons authorized by CCH to conduct that demolition. There is therefore no basis to conclude that CCH is the owner or operator of a demolition operation who intends to demolish so as to place the duty of complying with the wetting requirement upon CCH. The civil penalties for the alleged violations of 40CFR61.22(d)(4)(1) should be vacated.

V

Lastly respondent cites its own Regulation I, Section 9.11(a):

"It shall be unlawful for any person to cause or permit the emission of an air contaminant or water vapor, . . . if the air contaminant or water vapor causes detriment to the health, safety or welfare of any person, or causes damage to property or business." (emphasis added)

"Emission" means a release into the outdoor atmosphere of air contaminants. Regulation I, Section 1.07(j). The respondent has not proven any emission of the asbestos dust in question. The civil penalties for the alleged violations of Section 9.11(a) of respondent's Regulation I should be vacated.

VI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

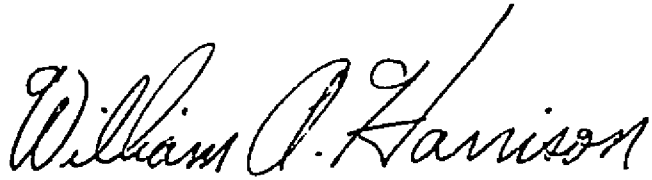
From these Conclusions the Board enters this

ORDER

The violations alleged and civil penalties assessed, total \$1250,
are each hereby vacated.

DONE at Lacey, Washington, this 21st day of October, 1980.

POLLUTION CONTROL HEARINGS BOARD



WILLIAM A. HARRISON
Presiding Officer

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER